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BANK PERTANIAN MALAYSIA BHD v. AMIR FIRDAUS NORDIN

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
B ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: N-03(IM)(NCC)-45-06-2017]
3 MAY 2018

C ***BANKRUPTCY:*** *Notice – Setting aside – Application for – Application to set aside second bankruptcy notice – First bankruptcy notice previously set aside – Res judicata – Whether applicable – Whether there was adjudication by court of issues raised – Whether filing of affidavit in reply by judgment creditor in order – Whether in breach of r. 22 of Bankruptcy Rules*

D On 13 January 2006, the judgment creditor ('the JC') obtained judgment against the judgment debtor ('the JD') under a loan facility granted by the JC to the borrower, Bunga Metro Sdn Bhd. The JD was a guarantor to the loan facility. Pursuant to the judgment, the JC filed bankruptcy proceedings against the JD ('the first BN'). The first BN was set aside by the court on 6 August 2015 and there was no appeal by the JC against the order of this E court setting aside the first BN. On 6 September 2016, the JC issued a second BN. On 29 November 2016, the JD filed an application under r. 95 of the Bankruptcy Rules 1969 ('the Bankruptcy Rules') to set aside the second BN. The JD's application to set aside the second BN came up before the Senior Assistant Registrar ('the SAR') on 22 December 2006 where the SAR F directed the JC to file affidavit-in-reply on or before 29 December 2016. Pursuant to the direction, the JC filed its affidavit in reply on 27 December 2016. On 29 December 2016, the JD filed a notice of appeal ('encl. 12') to the judge-in-chambers against the decision of the SAR in allowing the JC to file the affidavit-in-reply contending that the decision of the SAR was in G breach of r. 22 of the Bankruptcy Rules. On 26 January 2017, the SAR dismissed the JD's application to set aside the second BN. Aggrieved, the JD appealed to the judge-in-chambers ('encl. 13'). The Judicial Commissioner ('Commissioner') heard the JD's appeals in encl. 12 and encl. 13 together where the Commissioner allowed both the appeals. As regards the affidavit in reply, the Commissioner found that the application of the JD to set aside H the second BN was fixed for hearing on 22 December 2006 and since the JC failed to file its affidavit-in-reply in accordance with r. 22, the JD's appeal in encl. 12 ought to be allowed. As for the appeal on the setting aside of the second BN, the Commissioner held that since the first BN had been set aside, the JC was estopped from filing the second BN on the ground of *res judicata*. I Dissatisfied with the Commissioner's decision, the JC appealed.

Held (allowing appeal with costs)
Per Tengku Maimum Tuan Mat JCA delivering the judgment of the court:

(1) There is no provision in the Bankruptcy Rules on case management. Nevertheless, there is nothing in the Bankruptcy Rules which prevents the court from managing bankruptcy cases like all other cases. It is common knowledge that for a more efficient and speedy disposal of the cases, it has been the practice of the court to case manage all cases first, before the actual hearing takes place. In the event of *lacunae*, r. 276 of the Bankruptcy Rules allows for the application of the Rules of Court 2012. (para 18)

(2) The first date endorsed on the JD's summons in chambers *ie*, 22 December 2006 was a hearing date. In accordance with established practice, that was a case management date. In the circumstances, the filing of the affidavit-in-reply by the JC on 27 December 2016 for the hearing on 26 January 2017 of the JD's application to set aside the second BN was perfectly in order and not in breach of r. 22 of the Bankruptcy Rules. The purported granting of extension of time by the SAR to the JC to file the affidavit-in-reply did not arise. (para 19)

(3) For the doctrine of *res judicata* to operate, it is trite that there must be adjudication by the court of the matters or issues raised in the earlier proceedings. There were absolutely no facts adverted to by the JD as to what exactly were the matters ventilated and adjudicated in the first BN such that the second BN was caught by the doctrine of *res judicata*. Therefore, the doctrine of *res judicata* was not applicable in the instant case and the Commissioner was plainly wrong in allowing the JD's appeals. (paras 20 & 23)

***Bahasa Malaysia** Headnotes*

Pada 13 Januari 2006, pemiutang penghakiman ('JC') memperoleh penghakiman terhadap penghutang penghakiman ('JD') bawah kemudahan pinjaman yang diberikan oleh JC kepada peminjam, Bunga Metro Sdn Bhd. JD adalah penjamin kepada kemudahan pinjaman tersebut. Berdasarkan penghakiman, JC memfailkan prosiding kebankrapan terhadap JD ('BN pertama'). BN pertama diketepikan oleh mahkamah pada 6 Ogos 2015 dan tiada rayuan oleh JC terhadap perintah mahkamah mengetepikan BN pertama. Pada 6 September 2016, JC mengeluarkan BN kedua. Pada 29 November 2016, JD memfailkan permohonan bawah k. 95 Kaedah-Kaedah Kebankrapan 1969 ('KKK') untuk mengetepikan BN kedua. Permohonan JD untuk mengetepikan BN kedua didengar oleh Penolong Pendaftar Kanan ('SAR') pada 22 Disember 2006 dan SAR mengarahkan JC memfailkan afidavit balasan pada atau sebelum 29 Disember 2016. Mematuhi arahan, JC memfailkan afidavitnya pada 27 Disember 2016. Pada 29 Disember 2016, JD memfailkan notis rayuan ('lampiran 12') pada hakim

dalam kamar terhadap keputusan SAR dalam membenarkan JC memfailkan afidavit balasan atas alasan bahawa keputusan SAR melanggar k. 22 KKK. Pada 26 Januari 2017, SAR menolak permohonan JD untuk mengetepikan BN kedua. Terkilan, JD merayu pada hakim dalam kamar ('lampiran 13'). Pesuruhjaya Kehakiman ('Pesuruhjaya') mendengar rayuan JD dalam lampiran 12 dan lampiran 13 bersama di mana Pesuruhjaya membenarkan kedua-dua rayuan tersebut. Berkenaan dengan afidavit balasan, Pesuruhjaya mendapati bahawa permohonan JD untuk mengetepikan BN kedua telah ditetapkan untuk pendengaran pada 22 Disember 2006 dan oleh kerana JC gagal memfailkan afidavit balasannya mengikut k. 22, rayuan JD dalam lampiran 12 sepatutnya dibenarkan. Mengenai rayuan untuk mengetepikan BN kedua, Pesuruhjaya berpendapat bahawa oleh kerana BN pertama telah diketepikan, JC telah diestop daripada memfailkan BN kedua berdasarkan prinsip *res judicata*. Tidak berpuas hati dengan keputusan Pesuruhjaya, JC merayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Tengku Maimum Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Tiada peruntukan dalam KKK mengenai pengurusan kes. Walau bagaimanapun, tiada apa-apa dalam KKK yang menghalang mahkamah daripada menguruskan kes bankrap seperti kes-kes lain. Bagi pelupusan yang lebih cekap dan cepat, adalah menjadi amalan mahkamah untuk menguruskan semua kes terlebih dahulu, sebelum perbicaraan sebenar berlaku. Sekiranya berlaku kelompangan, k. 276 KKK membenarkan permohonan Kaedah-Kaedah Mahkamah 2012.

(2) Tarikh pertama yang disahkan ketika saman dalam kamar JD, iaitu 22 Disember 2006, adalah tarikh pendengaran. Selaras dengan amalan yang ditetapkan, ia adalah tarikh pengurusan kes. Dalam hal keadaan ini, pemfailan afidavit jawapan oleh JC pada 27 Disember 2016 untuk perbicaraan pada 26 Januari 2017 tentang permohonan JD untuk mengetepikan BN kedua adalah sempurna dan tidak melanggar k. 22 KKK. Pemberian lanjutan masa oleh SAR kepada JC untuk memfailkan afidavit dalam jawapan tidak berbangkit.

(3) Untuk doktrin *res judicata* beroperasi, adalah mantap bahawa harus ada adjudikasi oleh mahkamah tentang perkara atau isu yang dibangkitkan dalam prosiding terdahulu. Tidak ada fakta yang dikemukakan oleh JD tentang isu yang dibentangkan dan diadjudikasikan dalam BN pertama yang membuatkan BN kedua terangkap oleh doktin *res judicata*. Oleh itu, doktrin *res judicata* tidak terpakai dalam kes ini dan Pesuruhjaya adalah jelas terkhilaf dalam membenarkan rayuan JD.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Azman Jufri v. Medtronic Australasia Pty Ltd & Another Appeal [2015] 5 CLJ 1026 CA ***(refd)***
Chua Muk Kwee, Re: Ex-parte UMBC Finance Berhad [1994] 1 AMR 17 ***(refd)***
Datuk Lim Kheng Khim v. Malayan Banking Bhd [1993] 1 MLRA ***(refd)***
Huawei Tech Investment Co Ltd v. Transition Systems (M) Sdn Bhd [2013] 1 LNS 329 CA ***(refd)***
Malayan Banking Bhd v. Datuk Lim Kheng Khim [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826 HC ***(refd)***
Matthias Chang Wen Chieh v. American Express (Malaysia) Sdn Bhd & Another Appeal [2012] 1 LNS 256 CA ***(refd)***
Re Khondker Yarad Ahmed; Ex p MIDF Amanah Ventures Sdn Bhd [2016] 3 CLJ 637 HC ***(refd)***
Re Victoria (1854) 2 QB 387 ***(refd)***
Rohani @ Hamidah Nor v. Sincere Leasing Sdn Bhd [1993] 1 AMR 225 ***(refd)***

Legislation referred to:

Bankruptcy Rules 1969, rr. 22, 95, 276
Rules of Court 2012, O. 1 r. 2(2)

For the appellant - V Ganesalingam & Jasbeer Singh; M/s Rastam Singa & Co
For the respondent - Amir Firdaus Nordin & Roseli Abd Ghani; M/s A G Roseli & Assocs

[Editor's note: Appeal from High Court, Seremban; Bankruptcy No: 29NCC-1357-09-2016 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] This appeal filed by the appellant/judgment creditor ("the judgment creditor") is against the decision of the learned Judicial Commissioner (JC) of the High Court at Seremban in reversing the decision of the learned Senior Assistant Registrar ("the SAR"). The decision of the learned SAR was to dismiss the respondent's ("judgment debtor") application to set aside the bankruptcy notice dated 6 September 2016 ("the second BN") and to allow the judgment creditor's application to file an affidavit in reply to oppose the said application.

[2] We heard the appeal and had allowed the same. Below are our reasons.

The Background Facts

[3] On 13 January 2006, the judgment creditor obtained judgment against the judgment debtor under a loan facility granted by the judgment creditor to the borrower, Bunga Metro Sdn Bhd. The judgment debtor was a guarantor to the loan facility.

[4] Pursuant to the judgment, the judgment creditor filed a bankruptcy proceedings against the judgment debtor *vide* Bankruptcy No. 29-1092-07-2013 ("the first BN"). The first BN was set aside by this court on 6 August 2015. There was no appeal by the judgment creditor against the order of this court setting aside the first BN.

Proceedings In The High Court

[5] On 6 September 2016, the judgment creditor issued the second BN which was served on the judgment debtor on 23 November 2016. On 29 November 2016, the judgment debtor filed an application under r. 95 of the Bankruptcy Rules 1969 ("the Bankruptcy Rules") to set aside the second BN on the grounds that the second BN is caught by the doctrine of *res judicata*; that the value of the three pieces of land charged to the judgment creditor as security for the loan exceeds the debt or is sufficient to set-off the debt of the judgment debtor; and that the application is not prejudicial to the judgment creditor.

[6] The judgment debtor's application to set aside the second BN came up before the learned SAR on 22 December 2006 where the learned SAR directed the judgment creditor to file affidavit in reply on or before 29 December 2016. Pursuant to the direction, the judgment creditor filed its affidavit in reply on 27 December 2016.

[7] On 29 December 2016, the judgment debtor filed a notice of appeal (encl. 12) to the judge-in-chambers against the decision of the SAR allowing the judgment creditor to file affidavit in reply. The judgment debtor contended that the decision of the SAR was in breach of r. 22 of the Bankruptcy Rules which reads:

> Where any party intends to use affidavits in opposition to an application he shall deliver copies of them to every party affected thereby not less than three clear days before the day appointed for the hearing.

[8] On 26 January 2017, the learned SAR dismissed the judgment debtor's application to set aside the second BN. Aggrieved, the judgment debtor appealed to the judge-in-chambers (encl. 13).

[9] The learned JC heard the judgment debtor's appeals in encl. 12 and enc. 13 together where Her Ladyship allowed both the appeals. In respect of the appeal against the decision of the learned SAR allowing the judgment creditor to file the affidavit in reply, the learned JC held that r. 22 of the Bankruptcy Rules must be strictly observed and since the judgment creditor did not file any application for extension of time to file affidavit in reply, there were no reasons given for the delay in filing the affidavit in reply. Without any reason, the SAR could not exercise her discretion arbitrarily. As for the appeal on the setting aside of the second BN, the learned JC agreed with the judgment debtor that as the first BN has been set aside, the judgment creditor is estopped from filing the second BN on the ground of *res judicata*.

[10] Dissatisfied with the learned JC's decision, the judgment creditor appealed to this court. A

The Appeal

[11] Before us, on the setting aside of the second BN, learned counsel for the judgment creditor submitted that the learned JC erred in her finding on B *res judicata* as the doctrine of *res judicata* is not applicable to bankruptcy proceedings. In support of his submission, learned counsel cited *Malayan Banking Bhd v. Datuk Lim Kheng Khim* [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826; [1992] 2 MLRH 149; *Datuk Lim Kheng Khim v. Malayan Banking Bhd* [1993] 1 MLRA; *Re Khondker Yarad Ahmed; Ex p MIDF Amanah Ventures* C *Sdn Bhd* [2016] 3 CLJ 637; [2016] MLRHU 1; and *Re Victoria* (1854) 2 QB 387.

[12] In respect of the affidavit in reply, learned counsel submitted that the judgment debtor's appeal against the decision of the learned SAR was premised on the assumption that the date stated in the summons in chambers D ("the SIC") is a hearing date. That was not however the case as with the introduction of the case management system, the date endorsed in the SIC is not a hearing date but a case management date.

[13] In response, on the issue of affidavit in reply, learned counsel for the judgment debtor submitted that the judgment's debtor application to set aside E the second BN was fixed for hearing on 22 December 2016 and until that date, the judgment creditor did not file any affidavit in reply. According to learned counsel, since there was no affidavit in reply, the judgment debtor sought for an order that the second BN be set aside. The learned SAR however decided to extend time to allow the judgment creditor to file F affidavit in reply on or before 29 December 2016.

[14] It was further submitted for the judgment debtor that case management provided for under the Rules of Court 2012 ("the ROC 2012") is not applicable to bankruptcy proceedings. Hence, under r. 22 of the Bankruptcy Rules, the judgment creditor must file its affidavit in reply three days before G the hearing date of 22 December 2016. The learned SAR, according to the judgment debtor, had no discretion to extend time. The judgment debtor relied on *inter alia*, *Matthias Chang Wen Chieh v. American Express (Malaysia) Sdn Bhd & Another Appeal* [2012] 1 LNS 256; [2012] MLJU 214; *Azman Jufri v. Medtronic Australasia Pty Ltd & Another Appeal* [2015] 5 CLJ 1026; [2015] H MLJU 270; *Rohani @ Hamidah bt Nor v. Sincere Leasing Sdn Bhd* [1993] 1 AMR 225; and *Chua Muk Kwee, Re: Ex-parte UMBC Finance Berhad* [1994] 1 AMR 17.

[15] On setting aside of the second BN, learned counsel for the judgment debtor reiterated his position in the High Court that the second BN was I barred by *res judicata*. The following cases were cited in support of his argument: *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995]

3 CLJ 783; 3 MLJ 189; *Huawei Tech Investment Co Ltd v. Transition Systems (M) Sdn Bhd* [2013] 1 LNS 329; [2013] 5 MLJ 396. It was further submitted, in the alternative, that even if *res judicata* is not applicable, the filing of the second BN was an abuse of process of court.

Our Findings

[16] As regards the affidavit in reply, the learned JC found that the application of the judgment debtor to set aside the second BN was fixed for hearing on 22 December 2016 and since the judgment creditor failed to file its affidavit in reply in accordance with r. 22, the judgment debtor's appeal in encl. 12 ought to be allowed.

[17] As set out above, under r. 22 of the Bankruptcy Rules, the judgment creditor has to file the affidavit in reply three days before the hearing of the judgment debtor's application to set aside the second BN. Thus, the question which arises: when was the hearing of the application to set aside the second BN? The judgment debtor contended that it was on 22 December 2016 as the ROC 2012 under which case management is conducted, is not applicable to bankruptcy matters. Learned counsel for the judgment debtor cited O. 1 r. 2(2) of the ROC 2012 which reads:

> These Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

[18] We accepted that there is no provision in the Bankruptcy Rules on case management. Nevertheless, we found nothing in the Bankruptcy Rules which prevents the court from managing the bankruptcy cases like all other cases. It is common knowledge that for a more efficient and speedy disposal of the cases, it has been the practice of the court to case manage all cases first, before the actual hearing takes place. We noted that in the event of *lacunae*, the Bankruptcy Rules, in fact, allows for the application of the Rules of Court 2012. Rule 276 of the Bankruptcy Rules states:

> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

[19] We were therefore unable to agree with the judgment debtor that the first date endorsed on the judgment debtor's SIC ie, 22 December 2016 was a hearing date. In accordance with established practice, that was a case management date. In the circumstances, the filing of the affidavit in reply by the judgment creditor on 27 December 2016 for the hearing on 26 January 2017 of the judgment debtor's application to set aside the second BN was perfectly in order. It was not in breach of r. 22 of the Bankruptcy Rules. The purported granting of extension of time by the SAR to the judgment creditor to file the affidavit in reply did not arise.

[20] On *res judicata*, we found that the doctrine is not applicable in the instant case. We were not convinced that the cases relied upon by the judgment creditor to support the argument that *res judicata* does not apply, were wrongly decided. In *Malayan Banking Bhd v. Datuk Lim Kheng Khim (supra)*, Abdul Hamid Mohamed JC (later CJ), said:

> Learned Counsel for the judgment debtor argued that the petitioning creditor was estopped from commencing the present bankruptcy proceeding against the judgment creditor (*sic*) because earlier on a receiving order and adjudication order had been made by the High Court but set aside by the Supreme Court. However, he conceded that the order of the High Court was set aside on the sole ground that the bankruptcy notice was defective since the amount of interests were not quantified.
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> He cited the following authorities: ...
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> Clearly these authorities are not on point as none of them is a bankruptcy case. I asked the learned Counsel if he could show me an authority which supported his contention. He admitted he could not. I am of the view that the decision of the Supreme Court on the earlier order made by Dzaiddin J in the earlier proceeding, on the ground that it (the Supreme Court) did, does not operate as *res judicata* against the petitioning creditor from issuing a fresh bankruptcy notice. The matter is *res judicata* as regards the earlier notice, not a fresh notice - see *In Re Victoria Ex-parte Victoria* [1894] 2 QB 387.

[21] The decision of the High Court in *Malayan Banking Bhd v. Datuk Lim Kheng Khim (supra)*, was affirmed by the Supreme Court. Through Mohamed Dzaiddin SCJ (as the former CJ then was), the Supreme Court in *Datuk Lim Kheng Khim v. Malayan Banking Bhd (supra)*, stated that:

> After hearing the creditor's petition and the submissions of Counsel on 27 January 1992, the learned Judicial Commissioner was satisfied that the appellant had not shown sufficient cause why the receiving and adjudication orders should not be made. Accordingly, he made the orders in terms.
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> Before us, Encik Ooi Teik Hoe, Counsel for the appellant, raised several grounds of appeal, contending that the learned Judicial Commissioner was wrong in law on his decision. In dismissing the appeal, we hasten to state that we have no reason to disagree with the decision of the learned Judicial Commissioner. However, we would like to elaborate on the effect of the two affidavits (enclosures 3 and 15) *vis-a-vis* the bankruptcy petition.

[22] From the above decision of the Supreme Court, clearly it has upheld the findings of the High Court in *Malayan Banking Bhd* on all issues, including the issue of *res judicata*.

[23] In any event, for the doctrine of *res judicata* to operate, it is trite that there must be adjudication by the court of the matters or issues raised in the earlier proceedings. There were absolutely no facts adverted to by the judgment debtor as to what exactly were the matters ventilated and

adjudicated in the first BN such that the second BN is caught by the doctrine of *res judicata*. In other words, apart from the bare averment on *res judicata*, the judgment debtor did not apprise us as to what were the issues that had been finally determined in the first BN. However, it was apparent from the submission for the judgment creditor (which the judgment debtor did not deny) that in the first BN, the name of the judgment debtor was wrongly stated in the advertisement for substituted service. The setting aside of the first BN on that issue cannot and does not amount to *res judicata* to estop the judgment creditor from filing the second BN when the judgment itself remains valid and unsatisfied. Neither can the filing of the second BN, upon setting aside of the first BN due to the mistake in the judgment debtor's name, be said to be an abuse of process of the court.

[24] For the above reasons, we found that the learned JC was plainly wrong in allowing the judgment debtor's appeals. We therefore unanimously allowed the judgment creditor's appeal with costs. The order of the High Court was set aside.